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IN THE

Supreme Court of the United States

TERM 1952.

No. [redacted] 54

MODERN MANUFACTURING COMPANY, INC.,
Petitioner,

NATIONAL LABOR RELATIONS BOARD and
SOMERSET CLASSICS INC.,
Respondents.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

JAMES BARNES,
Counsel for Petitioner,
Modern Manufacturing Co., Inc.

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NATIONAL LABOR RELATIONS BOARD and SOMERSET CLASSICS INC.,
Respondents.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

MODERN MANUFACTURING COMPANY, INC. prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the case entitled *National Labor Relations Board, Petitioner,* vs. *Somerset Classics, Inc., and Modern Manufacturing Company, Inc.,* Respondents, which decree was entered on the 14th day of February 1952.

Opinions Below.

The opinion of the Circuit Court of Appeals, Second Circuit, is reported in 193 Fed. 2nd 613. A motion for rehearing was duly made and denied February 13th, 1952 without opinion.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on February 14, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. A. Section 1251 (1).

Questions Presented.

Whether an order of the National Labor Relations Board seeking to remedy an alleged unfair labor practice not charged in the complaint or tried at the hearing thereon should be enforced.

Whether a corporation, a minority of whose stockholders have an interest in another corporation charged with an unfair labor practice should be held responsible as an "employer" of the employees of the latter corporation under the provisions of Section 2 (2) of the National Labor Relations Act, merely because both corporations are jointly owned by the same family.

Statute Involved.

The pertinent statutory provisions are printed in Appendix A, *infra*, pp. 10 to 13.

Statement.

A petition was brought in the Circuit Court of Appeals for the Second Circuit pursuant to Section 10(e) of the National Labor Relations Act seeking to enforce an order of the National Labor Relations Board. The order in question was issued after hearing on a complaint issued by the Board.

The complaint charged that there was a total lockout of the employees of Somerset Classics Inc. at its plant at

Rome, New York, between two specific dates: October 27, 1948 to November 29, 1948. For the period *after* that date no lockout was charged, but it was charged that after that date there was a refusal to employ eleven specifically named employees. The case was tried on the basis of the complaint. There was no issue of a general or partial lockout *after* November 29, 1948, and each of the eleven girls testified as to why she thought she specifically was the subject of discrimination (B. A. 184-208; 208-224; 224-240; 240-253; 254-261; 261-267; 267-274; 290-296; 296-302; 302-315).[1]

At one point during the trial, General Counsel stated that he might wish to add to the list of those who had been allegedly discriminated against in the re-hiring (P. A. fols. 476, 477). This was strenuously objected to by both Respondents (P. A. fol. 477), and the General Counsel then indicated that he would not move to amend his complaint in this regard (P. A. fol. 477). In his Intermediate Report and Recommended Order the Trial Examiner, referring to other employees not reinstated in addition to the eleven specifically named, stated: "However they were not named in the complaint as having been denied reinstatement and the General Counsel stated at the hearing that he did not desire to amend the complaint to include such additional employees. No relief therefore will be recommended as to such employees after November 29, 1948" [B. A. 142, footnote 92).

The complaint also charged that petitioner Modern Manufacturing Co., Inc. was the "employer" of the employees of Somerset Classics Inc. within the meaning of Section 2 (2) of the National Labor Relations Act.

1. For the convenience of the Court, reference to the portions of the record printed in the appendix to the Board's brief in the Circuit Court of Appeals are designated "(B. A.)". Petitioner herein did not file a printed appendix to its brief in the court below, but has printed an additional portion of the record in connection with this petition. For the convenience of the Court, reference to the additional portions of the record printed in connection with this petition by petitioner are designated "P. A.)".

Modern Manufacturing Co., Inc. was located in New York City. It was a dress manufacturer (B. A. 23, 36; 169). Somerset Classics Inc. was a dress contractor located at Rome, New York (B. A. 36). The majority of the shares of Modern Manufacturing Co. Inc. were owned by one Sigmond Friedman (B. A. 470) who was also the President of that corporation (B. A. 470) in full charge of all its affairs and directing its policies (P. A. fol. 478, B. A. 356, 374, 384, 385, 406-407).

The minority stockholders of Modern Manufacturing Co., Inc., consisting of his wife and three sons all active in the business of Modern Manufacturing Co., Inc., owned all of the stock of Comerset Classics Inc. (through the means of a third corporation not pertinent here). Sigmond Friedman owned no stock in Somerset, was not a director or officer (B. A. 469), and took no part in the management of Somerset Classics Inc. (fol. 479).

Although David and Joseph, two of Sigmond Friedman's sons, coordinated in handling the production of Modern in purely administrative capacities (B. A. 406-407, 356), they had no right to change the policies set by their father even when he was absent (B. A. 406-407). Sigmond Friedman was not personally interested or concerned with the financial welfare of Somerset (P. A. fol. 479). During the period from the beginning of the union drive in early October, 1948, until late January or early February, 1949, Sigmond Friedman did not know that any union activity was going on in the Somerset plant (P. A. fols. 479, 480, 481).

The Board order issued subsequent to the hearing held among other things:

(a) That a lockout occurred not only for the period beginning October 27, 1948 and terminating November 29, 1948 as alleged in the complaint but that a *partial* lockout continued after November 29, 1948 indefinitely into the

future (B. A. 19) until *every person on the payroll* on October 27, 1948 was offered reinstatement, and directed back pay for the intervening period (B. A. 25, 26).

(b) That Modern Manufacturing was the "employer" of the employees of Somerset Classics Inc. and fully responsible with Somerset Classics Inc. for the carrying out of the remedy prescribed in the Order (B. A. 23, 27, 28).

The Circuit Court of Appeals granted enforcement of the order (190 Fed. 2nd 613, 616).

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In granting enforcement of an order designed to remedy an alleged unfair labor practice, to wit, an alleged partial lockout after November 29, 1948, not charged in the complaint or tried at the hearing before the Board.

2. In holding the petitioner Modern Manufacturing Co. Inc. to be the employer of the employees of Somerset Classics Inc.

3. In granting enforcement of the Board order.

Reasons for Granting the Writ.

1. There is an important question of due process involved in this case. It would indeed be a serious threat to the guaranties of the due process clause of the Constitution if administrative bodies could deprive persons of property without first issuing a complaint and conducting a hearing upon such complaint. Yet that is exactly what has transpired in this case. The complaint did not charge any lock-out after November 28, 1948. It was specifically

decided at trial by counsel for the National Labor Relations Board not to amend the complaint and the Trial Examiner refused to recommend any relief on any grounds not specified in the complaint (B. A. 142, footnote 92).

In *N.L.R.B.* v. *Reliable Newspaper Delivery,* 187 Fed. 2d 547 (1951) a similar enlargement of the complaint was attempted by the Board. As stated by the Court in that case (p. 550):

> "Only four of the eight non-union employees were named in the charge and complaint for the Labor Board. The affirmative proceedings recommended by the Examiner were confined to those four. The Board in its Order included 'all other non-union employees who were similarly situated * * *.'"

With reference to this action on the part of the Board the Court stated (p. 550):

> "If the Board had intended to include all the other non-union employees allegedly similarly situated, complaint should have been amended accordingly, notice given to Respondent and sustaining proof introduced."

As was pointed out in *Hymes* v. *Grimes Packing,* 185 Fed. 2d 338 (p. 341):

> "It would be a violation of the Due Process Clause of the Fifth Amendment for the District Court or this Court to compel appellees to submit to the Court's determination issues not pleaded by either of the parties * * *."

The Act itself provides that if a complaint is amended, Respondents shall have a right to file an answer to the amended complaint and to give testimony thereon (Sec. 10 [b]) Labor Management Relation Act as amended.

2. The Court below has either misunderstood or misinterpreted an opinion of this Court of major importance, and it is important that the opinion of this Court be clarified in the respect in which it was interpreted. The opinion referred to is that set forth in the *National Licorice Co.* v. *N.L.R.B.*, 309 U. S. 350. The Court below, in seeking to sustain that portion of the Board order which sought to remedy the alleged partial lockout subsequent to November 29, 1948, held that the Board had jurisdiction to issue an order in said respect. It stated:

> "Its jurisdiction having once been invoked in regard to the initial plant shut-down, and measures properly remedial thereto, any unfair labor practices growing out of and related to this form of violation come within the Board's authority. *National Licorice Co.* v. *N.L.R.B.*, 309 U. S. 350, 369."

In deciding the *National Licorice* case, this Court specifically stated that it was not deciding the type of issue before the Circuit Court of Appeals in this case. This Court stated that the argument in that case was addressed "only to want of power in the Board" and raised "no question of unfairness" to the employer "in the preparation of his case" (p. 368). That is the identical question, however, that was raised by Petitioner in this case. The Petitioner did raise the "question of unfairness" "in the preparation of his case." In the *National Licorice* case the only question involved was whether or not a complaint could issue and a hearing be held upon a charge not originally contained in the *charge* filed by the union before the complaint was issued. In this case the issue is whether or not the Board can issue an order seeking to remedy a charge not contained in the *complaint* nor tried at the hearing.

The Court below has held that the *National Licorice* case is authority for the latter. This interpretation should be corrected by this Court.

3. The decision of the Court below in the instant case is in direct conflict with the decision of the U. S. Court of Appeals for the District of Columbia in *Press Co. Inc.* v. *National Labor Relations Board,* 118 Fed. 2d 937, certiorari denied 313 U. S. 595, 61 Supreme Court 1118. In the latter case the parent corporation (a newspaper corporation) owned *all* of a subsidiary newspaper corporation's stock. The three highest officers in each corporation were the same men, and they also constituted a majority of the board of directors of the subsidiary. There was no question that the subsidiary corporation had engaged in certain unfair labor practices. The National Labor Relations Board holding that the parent corporation was the employer of the subsidiary corporation's employees, made its order to correct the unfair labor practice run against the parent corporation as well as the subsidiary corporation. However, the Circuit Court of Appeals for the District of Columbia reversed the order in this respect, and stated, page 945:

> "There is undoubtedly a close community of interests between the different papers, but there is no testimony that the Gannet Company (the parent company) ever exercised control of the internal operations of the Press Company." (Parenthesized words added by writer.)

and further, on page 946, the Court of Appeals said:

> "Ownership of stock and identity of officers by themselves do not create the relation" (of agency). (Parenthesized words added by writer.)

The *Press* case has been cited with approval in *N.L.R.B.* v. *Bonita Fruit Co.,* 158 Fed. 2d 758 and *N.L.R.B.* v. *Red Rock Co.,* 187 Fed. 2d 76. The Circuit Court of Appeals below completely ignored the opinion in the *Press* case and stated:

> "We cannot ignore the fact, however, that both corporations were owned and controlled by members of the same family. See *N.L.R.B.* v. *Stowe Spinning Co.*, 336 U. S. 226, 227. Not only were the affairs of both well known to all within the family group, but the operation of the two plants were closely integrated."

The decision in the *Press* case would seem to be the one containing the better reasoning, since under Section 10(c) of the National Labor Relations Act as Amended, an order is only authorized to be issued against a person which the Board finds to have engaged in unfair labor practices. Therefore there must be some evidence on which to base a finding that the additional corporation sought to be held, affirmatively participated in the alleged unfair labor practices. The opinion of the Court below, however, is hinged upon no such facet, but only upon the theory that "the operations of the two plants were closely integrated." It is respectfully requested that this conflict between the Circuits be resolved in favor of the decision in the *Press* case.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES BARNES,
Counsel for Petitioner,
Modern Manufacturing Co., Inc.

Dated: Washington, D. C.
March 19, 1952.

APPENDIX A.

Definitions.

Sec. 2. "When used in this Act—

* * * * * *

(Employer)

(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

Prevention of Unfair Labor Practices.

Sec. 10

* * * * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated

agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor

practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by *substantial evidence* on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if

any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

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Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, 141, *et seq.*):	
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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 54

MODERN MANUFACTURING COMPANY, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The original opinion of the court below (R. 479-483) is reported at 193 F. 2d 613. The order denying rehearing (R. 489) was issued February 13, 1952, without opinion. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 15-155), are reported at 90 NLRB 1676.

JURISDICTION

The judgment of the court below was entered on February 14, 1952 (R. 490). The petition for a

writ of certiorari was filed on May 9, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and under Section 10 (e) and (f) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, 141, *et seq.*), are set forth in the Appendix to the petition, pp. 10-13.

QUESTIONS PRESENTED

1. The complaint alleged that petitioner unlawfully locked out all of its employees between October 27, and November 29, 1949. At the hearing it appeared that the lockout continued as to a portion of the employees after November 29. The legality of petitioner's continuation of the lockout was fully litigated. The Board found that the lockout, illegal in its inception, was illegally continued after November 29 and ordered appropriate remedial relief. The first question presented is whether, under these circumstances, the Board was precluded from finding that the illegal lockout continued after November 29, because continuation of the lockout was not alleged in the complaint.

2. Whether the Board properly found that petitioner, together with Somerset Classics, was responsible as an "employer" for the unfair labor practices in question.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon the usual proceedings under Section 10 of the National Labor Relations Act, as amended, the Board, on August 2, 1950, issued its findings of fact, conclusions of law, and order. In large part the Board's decision on the merits is not presently in issue. The narrow questions presented here involve only petitioner's status as an employer and the sufficiency of one aspect of the complaint. The facts pertinent to these issues may be summarized as follows:

1. *Petitioner's status as an employer*

The complaint alleged and the Board found that petitioner, Modern Manufacturing Company, Inc., and Somerset Classics, Inc., were joint employers and were jointly responsible for the unfair labor practices which occurred at Somerset's plant at Rome, New York.[1] Both petitioner and Somerset are New York corporations, engaged in the ladies' garment business. Modern purchases piece goods for the manufacture of ladies' dresses, cuts the material into garment sections at its own plant,[2] ships the sections to other firms for sewing and com-

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[1] Somerset Classics, Inc., has not appealed from the decision of the court below. In the proceedings before the court below, Somerset alleged that it was insolvent and on the verge of dissolution (R. 483).

[2] Modern operates a cutting plant under the trade name of Beacon Company (R. 101, 162, 171).

pletion, and then sells the completed garments to retail concerns (R. 23, 36; 169). Somerset works exclusively for Modern (R. 36; 165-166, 325, 350, 362). Outdoor Frocks, Inc., of Philmont, New York, and Greenwich Garment Company of Greenwich, New York, like Somerset, also work exclusively on Modern's garments (R. 23, 36, 132-133; 166, 159, 359-360). These three firms do the bulk of Modern's work (R. 133; 400, 458, 460, 461).[3]

Petitioner Modern and its three major contractors, Somerset, Outdoor and Greenwich, are completely owned, controlled, and operated as an integrated enterprise by members of the Friedman family which consists of Sigmond Friedman, Bertha, his wife, David their son, and Joseph and Max Donner (also known as Friedman) the sons of Mrs. Friedman by a previous marriage (R. 23, 35-36; 164, 169-170, 172, 352, 356, 468-470). The majority stockholder of Modern is Sigmond Friedman; the remaining shares are held by his wife and three sons (R. 35, 131; 374-375, 470). Mrs. Friedman and the three brothers own all the stock of Greenwich and Outdoor (R. 36, 131-132; 167, 171, 468, 469). Outdoor owns all of the Somerset stock (R. 24, 36, 132; 165, 172, 469). The five members of the Friedman family serve as directors and officers of the various Friedman companies (R. 131-132; 468-470). The president, vice president, and secretary-treasurer of Somerset are also, respectively, second vice president, vice president and

[3] In the parlance of the garment industry Modern is known as a jobber and the other firms, contractors (R. 23, 36; 166).

secretary of Modern (R. 23-24; 164, 165, 469, 470).[4]

The business affairs of all the Friedman companies, as a practical matter, are carried on as if they were one firm.[5] Sigmond Friedman, founder of the business, stated that he "ran the whole business with the boys and [his] wife as more or less a family matter." (R. 406). Although Sigmond

[4] The following tabulation, based upon exhibits in the record (R. 469-470), depicts the interlocking character of the Friedman enterprises:

Officers:	*Modern*	*Greenwich*	*Outdoor*	*Somerset*
Pres.	Sigmond Friedman	Joseph Donner	Max Donner	David Friedman
V. Pres.	Joseph Donner	—	—	Joseph Donner
2nd V. Pres.	David Friedman	—	—	} Max Donner
Sec'y.	Bertha Friedman	Max Donner	Joseph Donner	
Treas.	Max Donner	David Friedman	B. Friedman	
Directors:				
1	S. Friedman	J. Donner	B. Friedman	D. Friedman
2	Sam Negin	M. Donner	M. Donner	M. Donner
3	B. Friedman	B. Friedman	J. Donner	J. Donner
4	M. Donner	—	—	—
Stockholders:				
1	S. Friedman—101 Sh.	J. Donner—50 Sh.	D. Friedman—12 Sh.	Outdoor Frocks—200 Sh.
2	M. Donner—28 Sh.	M. Donner—50 Sh.	B. Friedman—14 Sh.	
3	D. Friedman—28 Sh.	B. Friedman—50 Sh.	J. Donner—12 Sh.	
4	J. Donner—13 Sh.	D. Friedman—50 Sh.	M. Donner—12 Sh.	
5	B. Friedman—30 Sh.			

[5] Historically, as well as operationally, Modern is the parent company of the Friedman enterprises. Modern was originally a partnership consisting of Sigmond Friedman and Bertha Donner, a widow. The two partners were subsequently married and eventually Mrs. Friedman's sons by her former marriage, Max and Joseph, were taken into the business, along with David Friedman, a son of the present marriage. In 1935, the entire assets of Modern were transferred to a newly formed corporation of the same name, the ownership of the new corporation being divided among the various members of the family (see n. 4). In 1933, prior to the incorporation of Modern, Friedman formed another corporation, Outdoor Frocks, and distributed the ownership among the various members of his family. The Greenwich and Somerset corporations were formed by the Friedmans in 1943 and 1947 respectively, and the ownership and control of these corporations is divided among the Friedmans in the manner indicated above (see n. 4) (R. 131-132; 374-376, 406, 356-357, 164, 379-380).

Friedman exercises ultimate control over Modern, he is aided in the conduct of the business by his sons, David and Joseph, who are in charge of Modern's sales and production matters (R. 24, 133; 356, 361-362, 384-385, 406-407). In addition to their duties for Modern, David and Joseph also exercise full control over the production operations and labor relations of Somerset, Outdoor and Greenwich (R. 23, 24, 133, 137; 327, 362, 365-367, 371; 407-408, 417).

The financial records and books of all the firms are kept in Modern's offices in New York or at the office of a commonly employed accountant (R. 134; 168, 171, 378); Somerset's payroll lists are sent to Modern's offices where Modern's bookkeeper performs the necessary clerical work and prepares the payroll checks on Somerset's account (R. 134; 350-351, 426-427, 452); when necessary, Modern advances funds to Somerset in order to meet the payroll (R. 135, 363); no formal billing practices are followed between Modern and the other Friedman concerns (R. 135; 160, 162). Each of the three Friedman brothers draws a salary from the contracting firm of which he is president, and also draws a salary from Modern (R. 134-135; 415, 429-430).

When Sigmond Friedman became ill in October 1948, at about the time the unfair labor practices occurred, David acquired the additional responsibility for allocating Modern's work to the subsidiary firms (R. 19, 24, 139-140; 388-389, 389-390, 398-399, 346-347, 425-426, 433-437). While acting in

this capacity, as an officer of Modern, David made the decision to stop sending work to Somerset, which was then being organized by the Union, and to curtail its workload when it resumed operations, and thus, as the Board found (R. 24, *ibid.*), "made Modern the means of accomplishing the anti-union policies of Somerset."

On the foregoing facts the Board found (R. 23-24, 128-140) that Modern and Somerset were engaged in a single integrated enterprise and that both were employers of the employees involved and jointly responsible for the unfair labor practices summarized below.

2. *The unfair labor practices*

Early in October, 1948, representatives of the Union [6] asked Somerset's local manager for a bargaining conference (R. 22, 116-117, 119, 125; 318, 319). He referred this request to David Friedman in New York (R. 22, 122, 127; 408, 450). Shortly thereafter, the shop forelady, wife of the local manager, made a speech to the employees stating that the plant would be closed if the Union campaign was successful (R. 17, 39, 41-47; 189-190, 201-202, 210-211, 229, 248-244, 263-264, 271, 291, 301, 304). A week or so later Joseph Donner [Friedman] made a similar speech to the Somerset employees (R. 17, 47-48; 190-192, 202-203, 204-206, 211-212, 220, 230-231, 232-233, 238-239, 244-245, 256-258,

[6] International Ladies' Garment Workers Union, A. F. of L., which had been designated by the employees as their bargaining agent.

264-266, 291, 292-293, 296, 297-298, 304-305, 311-315). Thereafter, with the consent of the local manager (R. 54-60), an anti-union petition was circulated among the employees (R. 17, 54-60; 244, 252-253, 305, 471-472). Finally, starting October 25, David Friedman, who was then president of Somerset and also, in his father's absence, the effective head of Modern, stopped sending goods to Somerset, thereby causing the plant to close down entirely on October 27, 1948 (R. 24, 139-140; 346-347, 433-437). A month later, Modern, still under David's control, resumed shipments to Somerset but on a greatly curtailed scale (R. 139-140; 425-426). Thereupon, Somerset partially resumed operations (R. 91-95; 425).

Upon these facts the Board found (R. 17-25; 41-128) that Modern and Somerset, in violation of Section 8 (a) (1) of the Act, interfered with, restrained and coerced their employees; in violation of Section 8 (a) (5), refused to honor the Union's bargaining request; and, in violation of Section 8 (a) (3), closed the Somerset plant on October 27, 1948, in order to discourage membership in the Union. The Board further found (R. 19, 88-95, 110), that Modern and Somerset, in violation of Section 8 (a) (3), continued, for the same illegal purpose, partially to maintain the lockout after November 29. The Board accordingly ordered (R. 27-31) petitioner and Somerset to cease and desist from the unfair practices found, to bargain collectively with the Union, to reinstate those employees locked out on October 27 who have not yet been reinstated, and to make whole all employees

for losses of pay suffered by reason of the discriminatory lockout.

3. *The facts relating to petitioner's procedural contention*

The complaint initiating this proceeding alleged, *inter alia,* that Modern and Somerset locked out Somerset's employees on October 27, 1948, and refused to reinstate them until November 29, 1948 (R. 11). The complaint further alleged, as a separate violation, that petitioner and Somerset discriminatorily refused to rehire eleven named employees after the plant reopened on November 29 (R. 11). On the basis of evidence adduced at the hearing the examiner found that the lockout of October 27 was not motivated by economic considerations, as petitioner and Somerset alleged, but was designed to defeat the Union (R. 64-88). The examiner also rejected the companies' contention that Modern limited its shipments to Somerset after November 29 for legitimate business reasons, and found that the reduction in shipments was designed, like the initial lockout, to defeat the Union (R. 88-95, 110). As a consequence of the reduction in shipments, of 70 employees on the payroll prior to October 27, only 49 were taken back on or after November 29 and 21 remained locked out (R. 96-97). In these circumstances the examiner found it unnecessary to pass on the allegation (R. 11, par. 12) that petitioner and Somerset had discriminatorily refused to rehire the employees named in the complaint, stating that "once an employee's rights have been violated by discriminatorily locking him

out, it is unnecessary to show that he was twice wronged by having been further discriminated against in the process of rehire" (R. 90). Although the examiner noted that more than the eleven persons alleged to have been discriminatorily denied reinstatement were affected by the partial continuation of the illegal lockout after November 29 (R. 96-97), he did not recommend reinstatement or back pay for all because they were not all named in the complaint.

The Board agreed with the examiner's finding that the lockout was illegally continued in part after November 29 (R. 19), and held that it was not precluded from remedying the violation in full by the failure of the complaint to allege that the lockout was partially continued after November 29. The Board said: "the violation found is of the same class of violation as that set up in the charge and complaint, and was a continuation of it in pursuance of the same objective" (R. 19, n. 11). Disagreeing with the trial examiner, the Board further held that in affording a remedy for this violation it was not limited by the independent allegation of the complaint, upon which it did not rely, that eleven employees were discriminatorily denied reinstatement after November 29. Consequently, the Board awarded reinstatement and back pay to all victims of the partial lockout (R. 25, 22, n. 21).

B. THE DECISION OF THE COURT BELOW

The Court of Appeals for the Second Circuit held that evidence on the record considered as a

whole sustained the findings of the Board. The court found (R. 482) that "substantial evidence supports the mutual responsibility of the two corporations [Modern and Somerset] for the acts in question." With respect to petitioner's procedural contention the court held (R. 483) that the Board's "jurisdiction having been invoked in regard to the initial plant shutdown and measures properly remedial thereto, any unfair labor practice growing out of and related to this form of violation comes within the Board's authority."

ARGUMENT

1. Petitioner's contention that in the absence of an allegation in the complaint that the illegal lockout was continued after November 29, the Board was powerless so to find raises no substantial issue warranting review by this Court. As the facts set forth above show, and as the trial examiner, the Board and the Court of Appeals found, the continuation of the lockout was part and parcel of the very transaction alleged in the complaint as a violation of Section 8 (a) (3) of the Act. Moreover, the precise question—the reason for reduced shipments from Modern to Somerset after November 29—was the subject of proof and counterproof by the Board and by petitioner at the hearing (R. 421-425, 465, General Counsel's Exhibits 3 and 4).[7] Spe-

[7] R. 465 shows the number of employees excluded after Somerset resumed operations on November 29. General Counsel's Exhibits 3 and 4 are accounting records of the Friedman enterprises which were not fully incorporated in the printed record because of their volume. On the basis of these accounting records the Board concluded (R. 91-95),

cifically, petitioner attempted to prove that the reduction in shipments which resulted in the partial lockout after November 29, was motivated by business considerations (R. 421-425). There is thus no merit in petitioner's claim (Pet., p. 3), that at the hearing "There was no issue of a general or partial lockout *after* November 29, 1948," and accordingly, there is no basis for its assertion that (Pet., p. 7), a "question of unfairness" is present which distinguishes this case from *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350. Indeed, although the trial examiner found that the continuation of the lockout was illegally motivated (R. 88-95), petitioner made no effort to reopen the record to adduce additional evidence on that question, and petitioner made no such motion either to the Board or the court below even after the Board in its decision granted full relief to the victims of the partial lockout. Cf. *National Labor Relations Board* v. *Greater New York Broadcasting Corp.,* 147 F. 2d 337, 339 (C. A. 2). Far from raising a substantial due process issue, petitioner's claim, at best, is "highly technical" (*National Labor Relations Board* v. *MacKay Radio and Television Co.,* 304 U. S. 333, 349-351) and merits no further review. See our brief in opposition to certiorari in *Olin Industries, Inc.* v. *National Labor Relations Board,* No. 586,

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contrary to petitioner's contention (R. 421-425), that Modern could have shipped Somerset enough work to keep it operating at pre-lockout capacity, but failed to do so for the same illegal reasons which motivated the original lockout.

October Term, 1951, p. 21, certiorari denied, 343 U. S. 919.

Petitioner's reliance upon the fact that the General Counsel did not amend the allegation of the complaint which named eleven specific employees as having been discriminatorily denied reinstatement after November 29, is misplaced. As the court below observed (R. 482-483):

> The Board relied upon the trial examiner's finding not of discrimination, but of the continued partial lockout, a violation of Sec. 8 (a) (1) and (3) which affects all those not rehired.

For this reason, *National Labor Relations Board* v. *Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547 (C. A. 3), cited by petitioner (Pet., p. 6), is not in point, as the court below noted (R. 482). That case, in the Third Circuit's view (187 F. 2d, at 550), involved only allegations that named individuals had been discriminated against, and did not involve a blanket unfair labor practice, such as a lockout, which, by its very nature, affects all employees.[8]

2. The holding of the Board and the court below that petitioner, as well as Somerset, was responsible for the unfair labor practices here involved rests entirely upon the Board's factual finding, sus-

[8] In addition, it should be observed that the language in the *Reliable* case to which petitioner refers is merely dictum and not a holding. The case was decided on entirely different grounds. 187 F. 2d, at 550.

tained by the court below, that the two firms were operated as a single integrated business (R. 23-24, 128-140, 482). That finding, as the evidence set forth above (*supra*, pp. 3-7), shows, is abundantly supported. In any event, petitioner's challenge poses no issue of general importance which warrants review by this Court. *National Labor Relations Board* v. *Nu-Car Carriers, Inc.*, 189 F. 2d 756 (C.A. 3), certiorari denied, 342 U. S. 919.

Contrary to petitioner's claim (Pet., p. 8), there is no conflict on the proposition that when two or more nominally separate corporations operate as a single entity, both may be held responsible for unfair labor practices affecting the employees of one of the corporations. *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U. S. 226, 227; *National Labor Relations Board* v. *Don Juan, Inc.*, 178 F. 2d 625, 627-628 (C. A. 2). Indeed, in *Press Co., Inc.* v. *National Labor Relations Board*, 118 F. 2d 937, 947 (C. A. D. C.), certiorari denied on matters not here relevant, 313 U. S. 595, with which petitioner claims conflict (Pet., p. 8), the court suggested that if the corporate respondents there involved had operated as a single integrated business, the court would have sustained the Board's order.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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